ACTIVE BUILDING & CIVIL CONSTRUCTION PTE. LTD., RE

HIGH COURT, SINGAPORE
CHAN SEK KEONG J
[COMPANIES WINDING-UP NO. 545 OF 1985]
26 SEPTEMBER 1991

COMPANY LAW: *Definition of "commencement of winding-up" in s. 328(1)(b) - Not defined in definition section but in s. 255 - Deeming provision - Voluntary winding up - Time of passing of resolution by the company - Intention of Parliament when amending s. 328(1)(b) - Practice by Official Receiver to admit proofs of debts or claims in accordance with s. 255 - Companies Act [Sing], ss. 255, 327, 328.*

This was an application by the liquidators of the company for directions pursuant to s. 273(3) of the Companies Act (the Act) as to whether the stated "period of 4 months before the commencement of the winding-up" in s. 328(1)(b) of the Act refers to the period of 4 months before (a) the date of presentation of the petition for winding-up or (b) the date of the winding-up order is made and/or where provisional liquidators are appointed, the date of appointment of the provisional liquidators.

Held:

[1] Section 255 of the Act clearly defines the expression "commencement of winding-up" to mean, in the case of a voluntary winding-up, to be the time of the passing of a resolution by the company; in all other cases winding-up commences at the date of presentation of the winding-up petition.

[2] In Singapore, the Official Receiver has always admitted proofs of preferential debts or claims under s. 328(1) of the Act as computed in accordance with the date of commencement as deemed by s. 255. There have not been any administrative complications in administering ss. 327 and 328 in this manner.

[3] Under the amendment of s. 328(1)(b) which allowed priority to an employee in the maximum amount of $6,250 for wages and salary for services whenever rendered, Parliament intended that preferential claims for wages and salary were to be computed before the date of the presentation of the petition and not before the date of the winding-up order.

[4] There is no reason why the date for computation of proofs of debt and the date for determining priority must be the same, whether on *a priori* or on practical grounds. Section 327 deals with proofs of debts and claims in the winding up, whether they have priority or not, whereas s. 328 deals with the ranking of such proofs and the limits of preferential claims.

[5] The expression "the commencement of winding-up" is used throughout Part X of the Act in at least 10 other provisions and no difficulty arises in relation to the application of s. 255 to these provisions. It is therefore difficult to justify the non-application of s. 255 to s. 328(1).

[6] In addition, s. 328 is expressed to be subject to the Act. Section 255 is not an ordinary definition provision which is normally expressed to be subject to the contrary intention of the text. It is a deeming provision. Accordingly, the meaning of the expression "the commencement of the winding-up" in s. 328(1)(b) of the Act has the meaning as defined in s. 255 of the said Act.

[Order accordingly.]

Case referred to:
Re Carapark Industries Ltd (In Liquidation) [1966] WN (NSW) 165 ***(not foll)***

Legislation referred to:
Companies Act [Sing], ss. 255, 273(3), 327, 328(1),(b), (d)
Companies Act 1961-1965 (NSW) [Aust], ss. 223, 292(1), (b), (d), 292

For the applicants - Yeo Khirn Hai
For the official receiver - Yap

JUDGMENT

Chan Sek Keong J:

This is an application by the liquidators of the abovenamed company for directions pursuant to s. 273(3) of the Companies Act as to whether the stated 'period of 4 months before the commencement of the winding up' in s. 328(1)(b) of the Companies Act (Cap 185 of the 1970 Edn.) refers to the period of 4 months before (a) the date of presentation of the petition for winding up; or (b) the date of the winding up order is made and/or where provisional liquidators are appointed, the date of appointment of the provisional liquidators.

The expression 'commencement of winding up' is not defined in the definition section, but in s. 255 which provides as follows:

(1) Where before the presentation of the petition a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and, unless the Court on proof of fraud or mistake thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case the winding up shall be deemed to have commenced at the time of the presentation of the petition for the winding up.

Section 255 is a deeming section and its meaning is as plain as can be. Accordingly, the liquidators should have no reason to seek the directions of the Court on this point. However, the liquidators have been advised by their solicitors that, in the context of s. 328(1)(b), that expression may not have either of the meanings deemed by s. 255 but means the date of the winding up order. The basis of this advice was not the New South Wales decision of *Re Carapark Industries Ltd (In Liquidation)* [1966] WN (NSW) 165.

In that case, the liquidators had asked for directions as to the meaning of the same expression as used in s. 292(1)(b) and (d) of the Companies Act 1961 - 1965 (which corresponded to s. 328(1)(b) and (d) of Cap 185). Street J held that that expression referred to the date of the winding up order and not the date of presentation of the petition as provided in s. 223 of the 1961 - 1965 Act (which also corresponded to s. 255 of Cap 185). His Honour gave 4 reasons for coming to that conclusion:

(1) there was 'in 1961 a well established universal practice regarding priorities, expressly conforming to s. 297 (1) of the 1936 Act, and fitting naturally and effectively into the basic concept of claims being computed for proof as at the date of the (winding up) order';

(2) if the expression were given the meaning as deemed by s. 223, paras. (b) and (d) would render the priority provisions of significantly less practical value to employees;

(3) the practical considerations in favour of determining priority with reference to the same date as that used for the purpose of determining admissibility and quantum of proof are overwhelming;

(4) there is a strong contextual justification for treating the legislature's use of the words 'commencement of the winding up' in s. 292 (1) as meaning the date of the winding up order, notwithstanding s. 223.

Reason (1) was based on the practice prevailing in New South Wales in and after 1961 of computing debts for the purposes of proof as at the date of the winding up. His Honour found no extraneous circumstances which suggested the desirability of changing the said practice. Reason (2) was based on the consideration that there was a less chance of a company being in arrears of salary and wages for a longer period that the legislature could not have intended not to give priority to wages and salaries during the period when the employees would most need priority (that is 4 months **before** the winding up order). Reason (3) was based on liquidators encountering 'administrative complications in having to acquire dissected proofs from priority claimants', and also possible disputes relating to appropriation of payments to different dates in order to avoid the operation of the said definition. Reason (4) was based on the habit of speech of lawyers on occasions when they used the phrase 'the commencement of the winding up' as descriptive of the winding-up order and the statement that the legislature had adopted this habit of speech. With respect to the fourth reason, His Honour further said:

> It is to be noted that ss. 291 and 292 comprise the whole of Pt X, div. 4, sub-div. 2 of the Act. The statutory heading of this part, divisions and sub-division are 'Winding Up', 'Provisions Applicable to Every Mode of Winding Up', and 'Proof and Ranking of Claims'. It is absurd to the point of being unacceptable to attribute to the legislature an intention that these 2 sections which it has grouped together and which deal, the one with proof, and the other with priority, of claims should have operation with reference to different dates.

I have given much thought and consideration to the reasons given by Street J for departing from the plain meaning and effect of the deeming provision. I find myself unconvinced by his reasons with respect to the situation in Singapore, even though our companies legislation is derived from Australia, and indeed perhaps from the same 1961-1965 Act. Here are my reasons: firstly, Counsel for the Official Receiver has informed the Court that the Official Receiver has always admitted proofs of preferential debts or claims under s. 328 (1) as computed in accordance with the date of commencement as deemed by s. 255. She has not said that there have been any administrative complications have arisen in administering ss. 327 and 328 in that manner. Nor has Counsel for the liquidators in this case contended that the liquidators had any difficulties with dissected proofs of debt. These considerations negate the first and third reason given by Street J.

As regards reason (2), our Parliament was aware of the possible inequity to employees who have rendered their services to the company between the date of presentation of the winding up petition and the date of the winding up order if they were not paid during that period and their wages and salaries were not given a preferential status over other unsecured debts. Section 328 (1) (b) of Cap. 185 was amended by Act No 13 of 1987 to allow priority to an employee in the maximum amount of $6250 for wages and salaries for services, **whenever rendered**. This amendment was an implied recognition by Parliament that preferential claim for wages and salary were to be computed before the date of the presentation of the petition and not before the date of the winding up order. The amendment has removed the inequity of the former para. (b) only but not the inequity that may arise under the existing paras. (c),

(d) and (e). The anomaly between para. (c) and s. 328 (6) is particularly startling. The latter section provides that a claimant under an insurance policy against liability to third parties taken out by the company has priority to all payments under s. 328(1)! The result is that third parties have better rights than employees of the company. Any defects in s. 328 (1) is however is matter for Parliament to remedy.

As regards reason (4), I do not think I am justified in holding that our Parliament has picked up the habit of Singapore lawyers, assuming that they had such a habit, of using the expressions 'the commencement of the winding up' and 'the date of winding up order' synonymously. With respect to the reasoning of Street J set out in the passage quoted above, I do not see why the date for computation of proofs of debt and the date for determining priority must be the same, whether on *a priori* or on practical grounds. Section 327 deals with proofs of debts and claims in the winding up, whether they have priority or not, whereas s. 328 deals with the ranking of such proofs and the limits of preferential claims.

The expression 'the commencement of winding up' is used throughout Part X of Cap. 185 in at least 10 other provisions. No difficulty arises in relation to the application of s. 255 to these provisions. I find it difficult if not impossible to justify the non-application of s. 255 to s. 328 (1). Moreover, s. 328 is expressed to be subject to the Act. Section 255 is not an ordinary definition provision which is normally expressed to be subject to the contrary intention of the text. It is a deeming provision. Accordingly, I am of the opinion that the meaning of the expression 'the commencement of the winding up' in s. 328 (1)(b) of Cap. 185 has the meaning as defined in s. 255 of the said Act.

Also found at [1991] 3 CLJ 2970